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FILEDCLERK U.S. DISTRICT COURT
CENTRAL DIST. OF CALIF.
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UNITED STATES DISTRICT COURT
 CENTRAL DISTRICT OF CALIFORNIA

CHRISTOPHER JANUARY

Plaintiff

CASE NUMBER:
 SACV11-1133-AG(RNBx)

v.

TD SERVICE COMPANY

Defendant(s),

PLAINTIFFS' RESPONSE IN
 OPPOSITION TO DEFENDANT'S
 MOTION TO DISMISS
 [FRCP Rule 12(b)(6)]

Plaintiffs ask the court to deny Defendant's Motion to Dismiss based on F.R.C.P. 12(b)(6), failure to state a claim upon which relief can be granted. Plaintiffs have stated claims upon which relief can be granted with specificity and clarity.

I. DISMISSAL IS INAPPROPRIATE UNDER RULE 12(B)(6)

Defendants, in their motion to dismiss under Rule 12 (b)(6), fail to address the issues now before the court. The only issue before the court is: Did the plaintiff plead sufficient facts to support a claim for which recovery can be had?

1 On a motion to dismiss, the Court must accept all the factual allegations Plaintiff as true, draw all
2 reasonable inferences in favor of the plaintiff.

3 (Scheuer v. Rhodes, 416 U.S. 232, 236, overruled on other grounds by Davis v.
4 Scherer, 468 U.S. 183 (1984); Cruz v. Beto 405 U.S. 319, 322 (1972).) To survive
5 a motion to dismiss a plaintiff need to plead "only facts to state a claim for relief
6 that is plausible on its face." (Bell Atlantic Corporation v. Twombly, 550 U.S. 544,
7 570 (2007).) A dismissal is only appropriate where the plaintiff fails to state a
8 claim supportable by any cognizable legal theory. (Balistreri v. Pacific Police
9 Department, 901 F.2d 696, 699 (9th Cir. 1990).) A complaint must "only give the
10 defendant fair notice of what plaintiff's claim and the grounds of which it rests".
(Conley v. Gibson, 355 U.S. 41, 47 (1957), abrogated on other grounds by Bell
11 Atlantic Corporation v. Twombly, 550 U.S. at 563.) Any existing ambiguities
12 must [*9] be resolved in favor of the pleading. (Walling v. Beverly Enters., 476
13 F.2d 393, 396 (9th Cir. 1973).)

14 In deciding a motion to dismiss, the court must accept as true the allegations of the
15 complaint and must construe those allegations in a light most favorable to the non-
16 moving party. (Wyler Summit Partnership v. Turner Broadcasting Inc., 135 F. 3d
17 658, 661 (9th Cir. 1998).) Generally, a court may not consider any material beyond
18 the pleading in ruling on a 12(b)(6) motion. Hal Roach Studios, Inc. v. Richard
19 Feiner & Co., 896 F. 2d 1542, 1555 n. 19 (9th Cir. 1990).) However, where it is
20 inclined to grant a motion to dismiss, a district court should provide leave to
21 amend unless it is clear that a complaint could not be saved by any amendment.
22 (Chang v. Chen, 80 F.3d 1293, 1296 (9th Cir. 1996).)

23 **II. SECTION II ARGUMENT IS FRIVILOUS**

24 1. Defendant, in defendant's Motion to Dismiss, under Section II makes the argument that:
25 Since T.D. SERVCE COMPANY was solely acting as substitute trustee, and since Civil Code
26 2924 expressly provides that a trustee is not subject to the California Fair Debt Collection Practices
27 Act set forth in 1778 et eeq., cannot possibly be liable for the unfair debt collection practices
28 pursuant to the state act."

29 2. As indicated in Plaintiff original complaint, Plaintiff is prepared to so stipulate. However, the
30 issue argued here is not an issue presently before this court and, therefore, the argument is
31 frivolous, is without merit, and has no bearing on the case at bar. In as much as no such claim was
32 made, the court is without power to consider the argument of Defendant.

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2 **III. FDCPA IS A STRICT LIABILITY STATUTE**
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5 3. In Defendant's second argument under section III, Defendant argues that Plaintiff must show
6 harm by the acts of Defendant. Defendants argument is frivolous, is without merit, and has no
7 bearing on the case at bar.

8
9 4. Again, Defendant argues Defendant's position from the unsupported pre-supposition that
10 Defendant is a proper agent of the principal. The only issue before the court is agency of the agent
11 to act for the principal. In the event that Defendant proves up agency, Plaintiff is prepared to
12 stipulate to Defendant's argument, however, said argument is frivolous as no such issue is before
13 the court.

14 **IV. AGENT FAILED TO SHOW AGENCY**
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17 5. In *Applied Equipment v. Litton* (1994) 7 Cal.4th 503, 511-514, the California Supreme Court
18 clearly articulated that an agent or employee can be liable. Defendant's suggestion that Defendant
19 was free to engage in fraud and had a license to commit torts without accountability holds no water
20 and flies directly in the face of public policy.

21
22 6. Respondent's argument that no liability can be imposed based on an agent's own acts and
23 omissions flies in the face of California statutes, case law, and public policy.
24 Contrary to the assertions made by Defendant in the moving papers, it is well-established in
25 California law that an agent is liable for acts "wrongful in their nature" Civil Code Section 2343.
26 The section states:

1
2 "One who assumes to act as an agent is responsible to third persons as a principal for his acts in the
3 course of his agency in any of the following cases and in no others. . . .
4

(3) [**51] When his acts are wrongful in their nature." (Emphasis added)

5
6 7. The cases of Younan v. Equifax Inc (1980) 111 Cal App 3d 498, Doctor's Company v Sup.Ct
7 (1989) 49 Cal.3d 39, and Allied Equipment v Litton (1994) 7 Cal 4th 503, 510, also stand for the
8 proposition that an agent may be pursued for acts that are tortious or wrongful in nature.
9

10 8. As described by the California Supreme Court in Allied, *supra*, the facts in Younan were as
11 follows:

12 "[T]he plaintiff alleged a conspiracy among his insurer and two of the insurer's
13 agents to deprive plaintiff of disability insurance benefits by falsely representing
14 that plaintiff would be examined by a medical doctor who would objectively
15 consider plaintiff's claim for benefits when in fact the examination was to be
16 conducted by a psychiatrist who had agreed, by prearrangement with the insurer, to
17 render a false report to provide a plausible excuse for denying the benefits
[Citation] The agents were held subject to liability for conspiracy to commit actual
fraud since they had a duty to abstain from injuring the plaintiff through express
misrepresentation, [**52] independent of the insurer's implied covenant of good
faith and fair dealing [Citation]" (Emphasis added) (See *Allied Equipment*, 7 Cal
4th at 512-513)

18
19 9. In Younan, the court held:

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21 "The law imposes the obligation that every person is bound without contract to
22 abstain from injuring the person or property of another, or infringing upon any of
23 his rights This duty is independent of the contract and attaches over and above the
24 terms of the contract [fn10] The fact that there existed a contract between the
plaintiff and the defendant would not immune the latter from penalty that is
ordinarily visited upon tortfeasors (*Jones v Kelly* (1929) 208 Cal 251 [280 P 942])
25
26

27 A cause of action for conspiracy will lie against agents and employees of insurers
28 even though the former are not parties to the agreement of insurance when they
join the insurer in a conspiracy to defraud the insured. As such, they are jointly

1 liable with those with whom they conspire to commit the tort. The Gruenberg
2 decision is fully consistent with our holding."(Younan, 111 Cal.App.3d at 510.)
3
4

5 10. Clearly, there is no blanket immunity from liability for adjusters in this State, as clearly
6 expressed by Civil Code Section 2343 Recent California case law confirms this For example, in
7 Shafer, *supra*, the Court of Appeal stated.
8
9

10 "[W]e rely on principles of agency law dating back more than a century, as
11 codified in the Civil Code "An agent is one who represents another, called the
12 principal, in dealings with third persons Such representation is called agency"
13 (10A West's Ann Civ. Code (1985) § 2295, p 427) "One who assumes to act as an
14 agent is responsible to third persons as a principal for his acts in the course of his
15 agency [P] [P] [w]hen his acts are [*32] wrongful in their nature" (Id, § 2343, p
16 667)
17

18
19 ""An agent or employee is always liable for his own torts, whether his employer is
20 liable or not" (Holt v Booth (1991) 1 Cal App 4th 1074, 1080,fn 5, accord,
21 Michaelis v Benavides (1998) 61 Cal App 4th 681, 686) "In other words, when the
agent commits a tort, such as fraud then the agent [is] subject to liability in a civil
suit for such wrongful conduct" (Mottola v R L Kautz & Co. (1988) 199 Cal App
3d 98, 108, [**54] accord, Crawford v Nastos (1960) 182 Cal App 2d 659, 664-
665, see generally 2 Witkin, Summary of Cal Law (9th ed 1987) Agency and
Employment, § 149, p 144)

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19 "[I]f a tortious act has been committed by an agent acting under authority of his
principal, the fact that the principal thus becomes liable does not, of course,
exonerate the agent from liability' The fact that the tortious act arises during the
performance of a duty created by contract does not negate the agent's liability
(Bayuk v Edson (1965) 236 Cal App 2d 309, 320)

CONCLUSION

Plaintiffs maintains that Defendant(s) motion of dismissal is without merit, and that counsel, in making said claim, has failed to speak with candor with the court. This case must immediately be moved to Rule 16 for case management plan, and Rule 26f for discovery.

Respectfully Submitted,

Christopher January
1417 South Ridgeley Dr.
Los Angeles, CA. 90019

DATE:

9/2/11

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VERIFICATION
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I, Christopher January, do swear and affirm that all statements made in this Reply in opposition to the Motion To Dismiss herein are true and accurate, in all respects, to the best of my knowledge.

7 Christopher January
8 1417 South Ridgeley Dr.
9 Los Angeles, CA. 90019
10
11

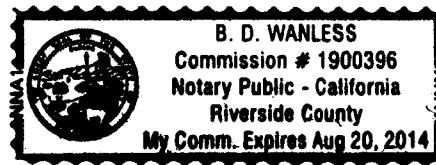

10 FIRST NAME

SECOND NAME

12 The Person above, who proved to me on the basis of satisfactory evidence to be the person whose
13 name is subscribed to this document and acknowledged to me that he/she executed the same in his
14 authorized capacity and that by his signature on this instrument who is the person who executed
15 this instrument.

16 I certify under PENALTY OF PERJURY under the laws of this State that the foregoing paragraph
17 is true and correct.

18
19
20 Witness my hand and official seal.



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22
23
24 **NOTARY PUBLIC IN AND FOR
THE STATE OF CALIFORNIA**

25
26
27
28 Notary Seal

PROOF OF SERVICE

I, Christopher January, declare as follows. I am over the age of 18 years.

My address is:

**1417 South Ridgeley Dr.
Los Angeles, CA. 90019**

On September 2, 2011, I served the foregoing document described as:

**PLAINTIFFS' RESPONSE IN OPPOSITION TO DEFENDANT'S
MOTION TO DISMISS**

On all interested parties in this action by placing a true and correct copy thereof in a sealed envelope, with first-class postage prepaid thereon, and deposited said envelope in the United States mail in **Santa Ana, CA.**, addressed to:

Lawrence J. Dreyfuss
THE DREYFUSS FIRM
A Professional Law Corporation
7700 Irvine Center Drive, Suite 710
Irvine, California 92618

I declare under penalty of perjury that the forgoing is true and correct,

Executed on September 2, 2011 at Santa Ana.

Joyce Garcia
Joyce Garcia